Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

SYED MOUZZAM ALI,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the California Court of Appeal erred in holding that a city requirement that a landowner complete a land use development approval process by itself constitutes a compensable "temporary" regulatory taking under the Fifth Amendment?

Whether the California Court of Appeal erred by holding that a land-use regulation that violates state law effects a temporary taking of property on that basis alone?

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CITATIONS TO OPINIONS BELOW

The decision of the California Court of Appeal was filed on December 28, 1999 and is reported at 77 Cal. App. 4th 246, 91 Cal.Rptr. 2d 458 (1999). Appendix A.

JURISDICTION

The decision of the California Court of Appeal was entered on December 28, 1999. App. A. The City filed a Petition for Rehearing. App. K. It was denied. App. E. A Petition for Review was filed with the California Supreme Court. App. J. The order of the California Supreme Court denying a petition for review was entered on March 29, 2000. App. F. The Petition for Writ of Certiorari is timely filed in accordance with Rule 13.1 of the Rules of this Court.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V, provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV, § 1, provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Civil Code § 7060 provides:

> § 7060. Prohibition against compelling owner to lease accommodations.
>
> (a) No public entity, as defined in Section 811.2, shall, by statute, ordinance, or regulation, or by administrative action implementing any statute, ordinance or regulation, compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease.
>
> (b) For the purposes of this chapter, "accommodations" means the following:
>
> > (1) The residential rental units in any detached physical structure containing four or more residential rental units.
> >
> > (2) With respect to a detached physical structure containing three or fewer residential rental units, the residential rental units in that structure and in any other structure located on the same parcel of land, including any detached physical structure specified in subparagraph (1).

Ordinance No. 164,175 of the City of Los Angeles, known as the "SRO Ordinance" is printed in Appendix I.

STATEMENT OF THE CASE

A. The SRO Ordinance And Its Administrative Relief Provisions.

In order to preserve the stock of low cost housing, the City of Los Angeles (City) adopted Ordinance No. 164,175 which placed a moratorium on issuing demolition permits for single room occupancy (SRO) hotels. App. I.

Section 1 of the Ordinance defined an SRO hotel as one where 30% or more of the dwelling units "do not contain a private bath and toilet facility within the unit."

Section 2 provided an exception if it is determined that "such building is infeasible to repair."

Section 3 provided that the City Council could grant a hardship exemption from the provisions of the ordinance "in cases of extreme hardship duly established to the satisfaction of the City Council."

Section 3 also provided that applications for a hardship exemption were to be filed with the Rent Stabilization Division of the Community Development Department.

Barbara Zeidman (Zeidman) was the Director of the Rent Stabilization Division from 1984 through late 1990. Her agency was responsible for implementing all aspects of the SRO Ordinance, including investigating both hardship applications and appeals by landowners protesting a SRO designation for their buildings. (RT, 402:25-405:6; JA, XIII, p. 3702, ¶¶ 2 and 3.)

B. The Enforcement Of The SRO Ordinance In This Case.

On November 17, 1988, the Ferraro Hotel was the scene of a major alarm fire, which resulted in substantial property damage and rendered the structure uninhabitable. (JA, XIV, p. 3741, ¶ 5.) Inspectors from the City's Department of Building and Safety conducted an inspection of the property the same day (RT, 523:20-525:20) to determine whether the premises were safe for entry or occupancy. (RT, 526:1-6.) After the inspection, Orders to Comply were posted on the property ordering, *inter alia*, that the building be vacated and the premises secured until all necessary repairs were performed. (JE 2 and 3.)

On December 16, 1988, Syed Mouzzam Ali (Ali) entered into an agreement with Fred Harouni to sell the Ferraro Hotel. (JE 135.) The sales agreement was handwritten by Fred Harouni and required that the property be demolished. (RT, 254:4-9.)

On January 19, 1989, Ali applied for a demolition permit. (JE 55-5; RT, 84:17-28.) Based upon information provided by Ali, Paul Wong, the supervising engineer of the Structural Plan Check Division of the Department of Building and Safety, believed that the Ferraro Hotel could be an SRO hotel and as such subject to a moratorium on the demolition of such buildings. (JA, XIII, p. 3626, ¶¶ 2-6.) Based upon this information, he advised the plan checker assigned to the application, Gene Edwards, that the Ferraro Hotel might be an SRO hotel. (Edwards Deposition, 15:2-24.)

Because there was insufficient information to reach a final determination on this matter, Edwards wrote corrections requiring compliance with the SRO Ordinance in order to gather additional information. (*Id.* at 19:6-14; 44:18-25; 47:23-48:3.) Subsequently, on February 28, 1989, Edwards met with Ali to discuss these corrections. (*Id.* at 53:11-54:7.)

Soon thereafter, Barbara Zeidman and members of her staff spent time with Ali explaining the hardship exemption process. (JA, XIII, p. 3703, ¶ 5.) Zeidman had several phone discussions with Ali concerning the Ferraro Hotel in the spring of 1989. (RT, 390:28-391:10; JA, XIII, p. 3703, ¶ 6.) They discussed a hardship exemption for the hotel and Zeidman mailed him an application. (RT, 405:27-405:19; JA, XIII, p. 3703, ¶ 6.) Ali did not file this application. (RT, 405:20-21; JA, XIII, p. 3703, ¶ 6.) At no time during these conversations did Ali state or imply that the Ferraro Hotel was not an SRO hotel. (RT, 406:2-5; JA, XIII, p. 3703, ¶ 6.)

On August 8, 1989, based upon the hazardous condition at the Ferraro Hotel, the City Council adopted a motion, to authorize the Department of Building and Safety to hire a private security company to provide a 24-hour armed fire watch service for the Ferraro Hotel. (JE 17.)

C. The Judgment In *Ali I* Causes Plaintiff To Seek Administrative Relief.

Instead of seeking administrative relief, Ali filed a petition for a writ of mandate in the Superior Court on September 6, 1989, *Ali v. City of Los Angeles* (C736585)

[hereafter *Ali I*], alleging that he had applied for a demolition permit for the Ferraro Hotel; that the hotel was not an SRO hotel within the definition of the SRO Ordinance; and that the SRO Ordinance violated the Ellis Act, Govt. Code § 7060, et seq. App. K at App. 90-96.

The Ellis Act is a general state law adopted in response to the California Supreme Court decision in *Nash v. City of Santa Monica*, 37 Cal.3d 97, 207 Cal.Rptr. 285, 688 P.2d 894 (1984). That case upheld a local ordinance designed to preserve the limited supply of rental housing units in a community by preventing their removal from the rental housing market.

In response, the California Legislature enacted the Ellis Act (Government Code § 7060) which provided that "[n]o public entity . . . shall, . . . compel the owner of any residential real property to offer, or continue to offer, accommodations in the property for rent or lease."

In its demurrer in *Ali I*, the City argued that the Ellis Act did not prohibit a municipality from enacting an ordinance regulating the issuance of demolition permits. The City argued that Ellis Act only prohibits a public entity from compelling the owner of residential real property to offer the property for rent or lease, and that the SRO Ordinance did not compel Ali to offer his property for rent or lease. Therefore, the SRO Ordinance as applied to Ali did not run contrary to the Ellis Act. App. K at App. 110.

The City also argued that any determination by the city staff was administratively appealable and that this right of appeal would include a determination of whether the building is or is not a SRO hotel subject to the provisions of the SRO Ordinance. App. K at App. 106.

The trial judge accepted the City's legal arguments, and ruled that Ali was required to continue with the development approval process and obtain a final decision on his permit application. App. H. Ali did not appeal that judgment.

D. The City Reaches A Final Decision To Issue The Demolition Permit And Ali Sells The Property.

After losing in *Ali I*, Ali retained a new attorney and finally sought administrative relief from the City. (JE 184.) Hearings were held on May 31, 1990, before the Building Department's Advisory Appeals Board and on June 12, 1990, before the Board of Building and Safety Commissioners. (JA, XIV, p. 3745, ¶¶ 36 and 37.)

During the hearings there was evidence presented that each room at the Ferraro Hotel had a bath. (RT, 407:1-5.) This new information brought into question whether the Ferraro Hotel was properly classified as an SRO hotel. (RT, 407:15-21.)

Further Ali's new attorney provided Zeidman with new information regarding the Ferraro Hotel. (RT, 407:21-26.) Ali's attorney provided Zeidman with an appraisal of the Ferraro Hotel and a contract with the State of California to house parolees at the hotel which showed that each room had a bath. (JE 112, pp. 2-3; 124; RT, 411:20-412:15.)

Based upon this new information, Zeidman concluded that the Ferraro Hotel was not an SRO hotel. On August 1, 1990, she wrote Ali's attorney informing him of

that fact. (JE 199.) She also sent an interoffice memorandum to the Building Department with the same information on August 2, 1990. (JE 36a-36b.) A second memorandum was sent to the Building Department stating that her agency did not object to the issuance of a demolition permit for the Ferraro Hotel. (JE 201.)

A demolition permit was issued on August 8, 1990, (JA, XIV, p. 3745, ¶ 41) and demolition of the Ferraro Hotel started the next day. (JA, XIV, p. 3756, ¶ 42.)

Ali did sell to his original intended purchaser. (JE 135.) A four story mixed-use building was built on the site, with retail on the first floor, commercial uses on the second floor, and 32 residential units on the top two floors. (RT, 281:12-28.)

E. Proceedings In *Ali II* Relating To The Assessment Lien.

Ali filed another lawsuit against the City on August 15, 1990 (*Ali II*). The first cause of action sought to reverse the City's determination to impose lien assessments for the costs of the fire watch at the Ferraro Hotel. (JA, I, pp. 17-40.)

On May 9, 1995, in an unpublished opinion in case number B 077712, the California Court of Appeal reversed the trial court's denial of the Writ of Mandate and remanded the case for further proceedings. App. G.

F. Trial in *Ali II* And The California Courts Finding of a Temporary Regulatory Taking.

On November 20, 1995, leave was granted to Ali to file Second Amended Complaint. App. N.

The trial court bifurcated the proceedings, and first considered whether there had been a taking of property for which just compensation was required to be paid. The issue of damages and the trial on the cause of action for alleged deprivation of civil rights were left to a second phase. A jury was waived by both parties. (JA, XIII, p. 3612.)

On March 19, 1997, the trial on the takings claim commenced before Judge Lawrence Crispo. (JA, XIV, p. 3748.)

On April 9, 1997, the court ruled that the delay in issuing of the demolition permit for the Ferraro Hotel constituted a regulatory taking. App. D. Plaintiff argued that the decision in *Agins v. Tiburon,* 447 U.S. 255 (1980) was controlling. App. M.

Judge Crispo purported to apply these standards. He found as an historical fact that due to a misclassification of the property as a SRO hotel there was a delay in the issuance of a demolition permit between January 1989 and August 1990. Judge Crispo stated that: "The City's initial designation of the Ferraro as an SRO was erroneous. The SRO ordinance prevented the immediate demolition of the Ferraro. . . . " (JA, XIV, p. 3829.)

He also ruled that the City's action placing a fire watch at the Ferraro Hotel constituted a physical taking. (JA, XIV, p. 3830.)

On May 1, 1997, the court issued its ruling on Ali's due process claims. App. C. The court ruled that the City had given plaintiff notice and an opportunity to be heard and, thus, his procedural due process rights were not violated. (JA, XIV, p. 3896.) The Court also found that plaintiff's substantive due process rights were not violated. *Id.* Judge Crispo made the following findings about the character of the City's actions:

> "[T]he City's actions were not oppressive nor do they shock the conscience. While the actions of the City's employees were negligently performed, there is no credible evidence that they deliberately sought to deprive Mr. Ali of his due process rights. On the contrary, the court finds that they acted in good faith. Finally, the City's action, though misguided, was an attempt to further legitimate interests in protecting both its zoning integrity and the public." (JA, XIV, p. 3896.)

The trial court awarded damages for the taking in the amount of $1,199,237.00. The judgment entered also incorporated the findings relating to the retrial of the mandate proceedings on to the assessment liens. App. B.

Both the City and Ali appealed.

On December 28, 1999, the California Court of Appeal Division Four of the Second Appellate District issued an opinion affirming the Superior Court's determination that there had been a regulatory taking. App. A.

The Court of Appeal stated:

> "We conclude that the judgment in favor of Ali in inverse condemnation should be affirmed on the ground that the City's wrongful denial of a

demolition permit between January 1989 and August 1990 in violation of the Ellis Act effected a temporary regulatory taking of Ali's property." App. A at App. 4.

REASONS FOR GRANTING THE WRIT

The opinion of the California Court of Appeal deals with an issue of federal constitutional law in a way which substantively conflicts with decisions of this Court and therefore warrants review in the form of a writ of certiorari. See Rule 10(c) of the Rules of the Supreme Court of the United States.

The decision of the California Court of Appeals represents a radical expansion of regulatory takings doctrine that would impose enormous new financial liabilities on taxpayers across the country and seriously interfere with essential municipal land use regulatory functions. *Cf. Eastern Enterprises v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring and dissenting) (rejecting possible interpretation of the takings clause because it "would throw one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts").

As witnessed by the opinion of the California Court of Appeal, there is considerable confusion as to what constitutes a temporary regulatory taking. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 701 (1999) (Kennedy, J.) (observing that the court has

not yet provided a "definitive statement of the elements of a claim for a temporary regulatory taking").

Some of this confusion is due to this Court's holding in *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987) (*First English*) which has been interpreted by California Court of Appeal as standing for the proposition that a right to just compensation arises if a landowner can demonstrate that a government mistake during the permit approval process delayed the grant of a development permit.

Other precedent of this Court including *Agins v. Tiburon*, 447 U.S. 255 (1980) belies such a notion. Nevertheless, the City of Los Angeles has, as other jurisdictions undoubtedly will, fallen victim to judicial misunderstanding about regulatory takings.

Further, the California Court of Appeal has determined that a violation of state law can give rise to a compensable taking on that basis alone. To the extent that this is a case of first impression, review is also appropriate on the ground that the California Court of Appeal has decided an important question of federal constitutional law that has not been, but should be, settled by the Supreme Court of the United States. See Rule 10(c) of the Rules of the Supreme Court of the United States.

The potential liability of local governments will be substantially increased if the California Court of Appeal's theory of liability is left unchallenged. State law violations will become federal constitutional torts. Land-use decisionmaking bodies will be hesitant to grant administrative relief from interlocutory decisions for fear that an

admission of error or mistake, will give rise to claims for payment of just compensation.

A. A Delay Due to Mistakes Made During The Development Approval Process Does Not Constitute A Temporary Taking of Property.

This Court has said that the

> "mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. [Citation.] The reasons are obvious. A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired."

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-127 (1985).

This point was emphasized by the Court in *Agins v. City of Tiburon*, 447 U.S. 225 (1980). In that case, the City of Tiburon had begun and then abandoned condemnation proceedings against plaintiffs' property. The plaintiffs argued "that the city's aborted attempt to acquire the land through eminent domain had destroyed the use of the land during the pendency of the condemnation proceedings." *Agins*, 447 U.S. at 258 n.3. This Court rejected the plaintiffs' claim, stating:

> "The State Supreme Court correctly rejected the contention that the municipality's good faith planning activities, which did not result in the successful prosecution of an eminent domain

> claim, so burdened the appellants' enjoyment of their property so as to constitute a taking. (Citations) Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.' "

447 U.S. at 263 n.9 (citations omitted) quoting *Danforth v. United States*, 308 U.S. 271, 285 (1939).

In the present case the SRO Ordinance did not prohibit Ali from obtaining a demolition permit. To the contrary, it established the procedures that enabled Ali to obtain the demolition permit which he sought. Ali could have obtained a final decision on his permit request at any time. He was counseled about the administrative relief procedures very early in the development approval process.

Further, the City successfully defended the need for Ali to utilize these procedures in *Ali I*. Plaintiff did not appeal the judgment in that case. By failing to appeal the adverse judgment in *Ali I*, plaintiff is not entitled to attack the City for requiring him to follow the established procedures for obtaining a final decision on a demolition permit application. See *Mola Development Corporation v. City of Seal Beach*, 57 Cal.App. 4th 405, 413, 67 Cal.Rptr. 2d 103 (1997).

Ali is in the same position as the landowners in *Agins*. He is a landowner whose use of property was

restricted during the City's decisionmaking process. However, once a final decision was reached he was free to put his property to a productive use. Ali did not challenge the City's final decision as depriving of an economically viable use of his property. After Ali had sought and obtained administrative relief with respect to the SRO Ordinance, he was free to use the site as he desired. Although there was a delay in the sale of his property to Harouni, Ali did sell to the original purchaser. The final sales price was $2,350,000.00 (RT, 69:8-20), not the $2,700,000.00 stated in the original sales contract. (JE 135.) However, Davis Harouni, the son of the purchaser, testified that the price reduction was caused by three factors: (1) change in the market, (2) street dedication requirements in existence, but not taken into consideration at the time of the orginal contract in 1988, decreased the buildable area of the parcel, thus reducing its value, and (3) changes in the City's parking requirements reduced the size of the project.

As noted by the Court in *Agins* " . . . [m]ere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as "taking" in the constitutional sense.' [Citations]." (*Agins v. Tiburon, supra,* 447 U.S. at p. 263 n.9.)

The holding in *First English* does not support the California Court of Appeal's concern about delay during the development approval process.

The California Court of Appeal concluded that *First English* applied in a situation wherein the landowner had obtained requested permits, but could point to mistakes

made during the approval process which delayed the landowner's receipt of the final development approval.

The California Court of Appeal stated that:

> "The court in *First English* indicated two circumstances in which such a temporary denial of all use of the property would not require compensation: . . . the temporary deprivation was merely a normal delay in the permissible regulation of development. (482 U.S. at p. 321 [not deciding 'the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like'.]") App. A at App. 7-8.

The California Court of Appeal then focused on Ali's argument about the state law violation and concluded that " . . . the delay in demolition caused by the erroneous enforcement of the SRO ordinance despite the prohibitions of the Ellis Act was not a 'normal' delay in the development process. Because the delay temporarily deprived Ali of all use of his property and was not a normal delay in the development process, it was a temporary regulatory taking which required compensation under *First English.*" App. A at App. 14.

The California Court of Appeal's analysis of *First English* is wrong in a number of respects. *First English* does not explain what kinds of government action constitute a compensable taking of property. The question presented to this Court in *First English* related only to the remedy available once a taking had been proven. The plaintiff in that case sought "damages for the uncompensated taking of all use" of the property based on an

ordinance which prevented construction in the flood plain. The Court stated explicitly that it was not addressing whether the ordinance constituted a taking. See, 482 U.S. 313. ("We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property. . . . ").

The Court in *First English* was addressing the question that arises once there has been a judicial declaration that an ordinance has effectuated a taking and the government then elects to discontinue the regulation. At that point the issue becomes "whether abandonment [of that taking] by the government requires payment of compensation for the period of time during which regulations deny a landowner all use of his land." *Id.* at 318.

With respect to that issue this Court stated that, "[i]nvalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." *Id.* at 319.

Therefore a "temporary taking" occurs only after a court invalidates a final decision as imposing excessive restrictions on the use of land and that invalidation results in the government agency abandoning the disputed regulatory measure. In the present case Ali was not seeking to have the City abandon a disputed regulatory measure. That had already happened before Ali filed the current action. Ali just sought damages. As the above discussion makes clear, a landowner may not seek damages for a temporary taking in the first instance. Absent a request for relief from an adverse final decision, a claim for a temporary taking does not exist.

B. A Land-Use Regulation That Violates State Law Cannot Effect A Regulatory Taking of Property On That Basis Alone.

The mere fact that there was a violation of state law during the development approval process does not rise to a regulatory taking on that basis alone. In fact such a theory of recovery is inconsistent with the basic principles surrounding the Takings Clause.

The purpose of the Fifth Amendment Takings Clause is to deal with the situation where government action forces some private persons alone to shoulder public burdens, "which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

However, a takings claim always presumes that the government has a legitimate "basis" for its action; otherwise the governmental act is ultra vires and void. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

The Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power. * * * It is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *First English*, 482 U.S. 314-315.

The need for an "otherwise proper" regulatory measure is inconsistent with the California Court of Appeal's conclusion that a violation of state law constitutes a compensable taking on that basis alone. See John D. Echeverria, *Does a Regulation That Fails to Advance a Legitimate*

Governmental Interest Result in a Regulatory Taking, 29 Envtl. L. 853 (1999); and Matthew D. Zinn, *Ultra Vires Takings*, 97 Mich.L.Rev. 245 (1998).

As Justice Kennedy has observed, the Takings Clause "operates as a conditional limitation, permitting the Government to do what it wants so long as its pays the charge. The Clause presupposes what the Government intends to do is otherwise constitutional . . . " *Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

The United States Court of Appeals for the Fifth Circuit recently made the following observation about this issue saying that

> " . . . the question of whether governmental action undertaken without authority, e.g., a taking of private property for private use, is properly considered a violation of the Takings Clause or the Due Process Clause (or both) has not been definitively answered. Citation. Five Justices recently suggested that the Takings Clause presupposes legitimate government action, see Eastern Eneters. v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part) ("The [Takings Clause presupposes what the government intends to do is otherwise constitutional. . . . "); id. at 554 (Breyer, J., dissenting) ("As [the Takings Clause] language suggests, at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for legitimate government action that takes 'private property' to serve the 'public' good.") . . . ".

The John Corporation v. The City of Houston, 2000 U.S. App. LEXIS 13530 n.9 (2000).

However, it is clear that the California Court of Appeal views the Takings Clause as being concerned with punishing government action which it determines violates state law. Nothing in this Court's precedent suggests that the Takings Clause is to be used to punish state law violations.

CONCLUSION

For these and all the above reasons the petition for a writ of certiorari should be granted.

Dated: June 26, 2000

Respectfully submitted,

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